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People v. Wood

Court of Appeal of California, Fourth Appellate District, Division One

December 17, 2009, Filed

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Reporter
2009 Cal. App. Unpub. LEXIS 9959 *

THE PEOPLE, Plaintiff and Respondent, v. JAMES RICHARD WOOD, Defendant and Appellant. In re JAMES WOOD on Habeas Corpus.

Prior History: **[*1]** APPEAL from a judgment of the Superior Court of San Diego County. Super. Ct. No. SCD205782. Michael T. Smyth, Judge, and petition for writ of habeas corpus.

Disposition: Judgment affirmed in part, and reversed in part; petition denied.

Core Terms

photographs, video, shoot, outfit, sexual, dissuade, demeanor, copulation, e-mail, posing, six-minute, videotape, depicted, instruct, minutes, contends, wearing, defense counsel, trial counsel, touching, replied, consented, probative value, sexual battery, recorded, vagina, ineffective assistance of counsel, ineffective assistance, series of photographs, character witness

Judges: NARES, J.; BENKE, Acting P. J., HUFFMAN, J. concurred.

Opinion by: NARES

Opinion

A jury convicted James Richard Wood of (1) misdemeanor sexual battery (count 1: *Pen. Code,* [1] *§ 243.4, subd. (e)(1)*, hereafter referred to as *section 243.4(e)(1)*), and (2) attempting to dissuade a victim and witness (here, Christina H.) from reporting a crime (count 2: § 136.1, subd. (b)(1), hereafter referred to as section 136.1(b)(1)), which the court reduced to a misdemeanor. Count 1 was based on evidence that Wood, a photographer Christina hired to take more than 4,000 photographs of her in sexually suggestive and often nude poses for a calendar for her boyfriend, orally copulated her without her consent. Count 2 was based on evidence that, after Christina reported the incident to the police, Wood sent an e-mail to her warning her it was a crime to file a false police report, she would face a costly civil lawsuit if she continued her criminal complaint against him, and she should instruct a certain police **[*2]** detective to "back off" if she wanted to keep her graphic photographs private. The court suspended imposition of sentence, granted Wood summary probation, and committed him to the custody of the sheriff for 120 days.

Wood appeals the judgment and petitions for a writ of habeas corpus. In his appeal, he contends (1) the court unreasonably restricted the number of photographs admitted into evidence in violation of his due process right to present a defense (here, a mistake of fact defense); (2) his trial counsel provided ineffective assistance by failing to introduce into evidence a secret "nanny cam" videotape of the photo shoot that Wood maintains showed Christina reasonably appeared to consent to the oral copulation; (3) his trial counsel also provided ineffective assistance by failing to introduce into evidence the testimony of four female character witnesses whom Wood had also photographed in his home and who would have testified he was always

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[1] All further statutory references are to the Penal Code unless otherwise specified.

extremely professional and never made improper advances; (4) the court's failure to admit all of the photographs and defense counsel's failure to introduce in **[*3]** evidence the nanny cam videotape and the testimony of the character witnesses all impacted directly on the issue of count 2 and acted to deny Wood a fair trial; (5) section 136.1(b)(1) is either constitutionally flawed, or flawed as instructed, because the statute does not have a mens rea requirement; and (6) the evidence was insufficient to prove Wood violated section 136.1(b)(1) as it did not cover his conduct.

In his writ of habeas corpus petition, consolidated with his appeal for disposition, Wood asserts his "petition is in effect an alternative presentation" of two contentions raised in his appeal: (1) his trial counsel provided ineffective assistance by failing to introduce into evidence the testimony of four female character witnesses whom Wood had also photographed in his home and who would have testified he was always extremely professional and he never made improper advances; and (2) section 136.1(b)(1) is either constitutionally flawed, or flawed as instructed, because the statute does not have a mens rea requirement, and Wood's trial counsel provided ineffective assistance of counsel by failing to request an appropriate jury instruction.

We conclude the trial court violated **[*4]** Wood's right to present a defense and abused its discretion under *Evidence Code section 352* by unreasonably limiting the number of photographs presented to the jury. We reject the remainder of his contentions. Accordingly, we reverse Wood's conviction on count 1 (*§ 243.4(e)(1)*), affirm his conviction on count 2 (§ 136.1(b)(1)), and deny the petition.

FACTUAL BACKGROUND

A. *The People's Case*

1. *Count 1 (sexual battery)*

Christina testified that she although she was not a professional model and had never been involved in pornography, she responded by e-mail to what she thought was a professional online advertisement on craigslist, offering a "free photo shoot for a sexy calendar," and hired Wood to take photographs of her in sexually suggestive and sometimes nude poses for a calendar for her boyfriend. Feeling like she was auditioning, Christina attached to her e-mail some sexy photographs a friend had taken of her. Wood responded with an e-mail offering her the opportunity to participate in a three-hour photo shoot and instructing her to come alone.

In late October 2006 Christina drove to Wood's Del Mar Heights home, which was also his studio. Wood provided a written contract explaining that **[*5]** in exchange for her receiving the promised "sexy calendar" and a disk containing 500 photograph images, he would have the rights to all of the photographs. Christina signed the contract.

After the photo shoot began, Christina followed Wood's instructions, began taking off her clothes, and almost "right away" was nude. She indicated that, although many of the photographs depicted her in the nude and spreading her legs, she never placed anything into her vagina or engaged in masturbation. Christina stated she trusted Wood and denied that any "chemistry" existed between them.

Toward the beginning of the photo shoot, Wood asked her, "Does the photographer get some of that?" Christina stated she might have responded with a "funny face," but did not know whether he was serious and assumed he was joking.

Later, during the part of the session in which she was wearing a red-and-white outfit, as she was lying on her back on a couch with her legs raised and vagina exposed, Wood approached her and began "adjusting" her legs. Without saying anything to her, Wood "opened" her legs and began to lick her vagina. Christina testified she was "shocked" and "froze." She indicated she had not said anything **[*6]** that would have given him permission to lick her.

After trying to think of something to say, Christina told him, "I'm just here for the photos." When Wood started licking her again, she said again, "I'm just here for the photos." He finally stopped when she said the same thing a third time. Christina testified that she felt scared because Wood had "crossed a boundary," and she did not know what he was capable of doing. She did not know whether he would try to hurt or stop her if she "just left," so she "felt the best thing to do was to act calm." She explained that she did not scream because she "didn't want to aggravate the situation"; she "didn't want it to seem like something was wrong, so [she] could get out of there safely." She continued to pose in the nude for photographs and continued to smile.

Christina testified that when the photo shoot was over and she got into her car, she "just broke down" and called her sister, her best friend, and her boyfriend. She

was crying and "freaking out because of how he had licked" her and did not know whether she should call the police. She was "hysterical" when she spoke with her sister. She wanted to call the police because she felt "extremely **[*7]** violated." When shown her cell phone bill, Christina identified the calls she made to her sister, best friend, and boyfriend. After speaking to them all, she called the police.

After the police came to her apartment and took her statement, Christina was taken to a medical facility where she underwent a SART [2] examination, during which her vagina was swabbed for DNA.

During cross-examination by defense counsel, Christina testified that the oral copulation incident occurred when she was wearing a red-and-white outfit. She stated she was in a "survival mode" and wanted to leave, but admitted she continued participating in the photo shoot for at least one-and-a-half hours after the oral copulation occurred. Defense counsel showed her 16 photographs (exhibits 6 and H-V, later admitted into evidence) depicting her wearing different outfits. Christina acknowledged that exhibit 6 showed her smiling while wearing a purple bodice, which was the next outfit she wore after the incident occurred. Christina acknowledged she was smiling in several of the other photographs. Defense counsel showed a series of photographs taken before the incident occurred, depicting Christina **[*8]** wearing the red and white outfit. Christina agreed that some of the images depicted her touching her private parts, posing with a banana, and permitting Wood to position her legs. Defense counsel also showed a series of photographs that Wood took immediately after the incident occurred. As he was showing the photographs, Christina acknowledged the photographs captured her demeanor.

2. *Count 2 (attempting to dissuade a victim from reporting a crime)*

In late November 2006 San Diego Police Department Detective Richard Metz contacted Wood by telephone, identified himself, and informed Wood he was calling about a complaint Christina had filed with the San Diego Police Department. As shown by the transcript of the recorded conversation, which was admitted into evidence at trial and played for the jury, Wood denied touching Christina in an "inappropriate" way. When asked whether he "kiss[ed]" Christina's vagina, Wood answered, "No." Wood accused Christina of "just making stuff up" and, when Detective Metz asked him whether he was saying that Christina's allegation that he "had gone down on her" while he was posing her was "absolutely not true," Wood replied, "Yep." When Detective Metz asked **[*9]** Wood whether he was willing to give a "consensual mouth swab," Wood answered that he thought it was an invasion of his privacy "based upon somebody's false accusations."

Detective Metz testified that Wood denied Christina's allegations and stated he never orally copulated her. Although Wood initially did not want to voluntarily provide a mouth swab for DNA, he eventually provided one. By means of a stipulation, the jury was informed that Wood "could not be excluded as a possible contributor to the low level nonsperm DNA" found on Christina's vagina.

On January 9, 2007, Christina received an e-mail from Wood warning her it was a crime to file a false police report, she would "be facing a very costly civil suit from [him]" if she continued her criminal claims against him, and she should instruct Detective Metz to "back off" if she wanted to keep her graphic photographs private. Christina testified she felt "threatened" after she received that e-mail. She then contacted Detective Metz.

On January 10, 2007, Detective Metz arranged a recorded telephone call from Christina to Wood. A recording of the conversation was played for the jury, and the transcript was admitted into evidence. During **[*10]** the call, Wood told Christina that he "didn't do anything that [she] didn't consent to." He told Christina that her "masturbating in front of [him]" was "basically consent." When Christina replied that she was posing, not masturbating, Wood told her, "[Your] hands are there. You've got objects down there. You've got bananas. You've got all kinds of stuff." Christina replied she was posing with props and trying to look sexy. She also told Wood she was "upset" about his "licking" her. Wood then told her "it needs to go away before it gets ugly," and "if I meet with my attorney today is when it starts to get ugly." Wood also told Christina, "you have to tell the detective that you . . . rethought this and that," and "you just need to . . . convince him that you were . . . overreacting or however you want to put it." "[I]t needs to go away," Wood warned Christina, "unless you want this to turn into a nightmare." When Wood said she "didn't say stop" and "didn't close [her] legs," Christina replied, "I did freeze." She acknowledged that Wood did not "force" her, but said "[y]ou just did it without my permission."

[2] Sexual Assault Response Team.

Christina's boyfriend testified that on October 29, 2006, she called him at **[*11]** around 4:40 in the afternoon. Christina, who was crying, told him she had gone to get a calendar made and had been assaulted.

B. *The Defense*

David Rivera testified he was a photographer with nearly 20 years of experience in the photography business. He was familiar with digital cameras and with metadata, which is information like date, time and exposure that is recorded when an image is captured. Based on the metadata contained in the file folders of Wood's 4,291 digital photographs of Christina, he was able to determine the sequential order of the photographs. He opined that the photo shoot started at 10:59 a.m. and ended at 4:06 p.m., and the series of photos depicting Christina wearing the red-and-white panty and bra outfit, which began about one-and-a-half hours into the five-hour photo shoot, lasted about 43 minutes, ending at 1:11 p.m.. After that series of photographs, Wood took an additional 2,613 photographs of Christina. Rivera testified he viewed the photographs, and he did not detect a change in Christina's demeanor after the red-and-white outfit session; her demeanor remained consistent throughout the photo shoot. He opined that "just under" 10 minutes passed between the **[*12]** end of the red-and-white outfit session and the beginning of the next outfit series. The other costume changes occurred within a "[v]ery few seconds to a minute or so."

On cross-examination, Rivera acknowledged that through the use of free software, a skilled computer operator can manipulate metadata to alter the sequence of a series of photographs.

DISCUSSION

A. *Exclusion of Photographs*

In support of his appeal, Wood first contends the court unreasonably restricted the number of photographs admitted into evidence, and thereby violated his due process right to present a defense. We conclude the court violated Wood's right to present a defense and abused its discretion under *Evidence Code section 352* by unreasonably limiting the number of photographs presented to the jury.

1. *Background*

a. *People's motion in limine to exclude photos or limit the number admitted*

In their trial brief, the People filed a motion in limine to "[e]xclude or limit [the] number of photos taken of victim by Defendant." Indicating that the defense intended to offer into evidence *all* of the more than 4,200 photographs that Wood took of Christina, the People moved to "exclude such evidence" on the grounds that (1) the **[*13]** photographs were not relevant, and (2) for purposes of *Evidence Code section 352*, the prejudicial effect of such evidence would outweigh its probative value.

Specifically, the People argued the photographs were not relevant, and thus should be excluded, because (1) they would not show whether Christina "consented to [Wood's] licking her vagina;" (2) the defense "simply want[ed] to show the photos to the jury to embarrass and humiliate [Christina];" (3) Wood had "made his position clear that if [Christina went] forward with the case he [would] expose her photos to the world and things [would] get ugly and become a nightmare for her"; and (4) Wood controlled the camera and took photographs, which Christina "had no control over," of parts of her body, including close-ups of her vagina, and showing the photographs served no purpose "other than to re-victimize [her]." The People also argued that, under *Evidence Code section 352*, the prejudicial effect of such evidence would outweigh its probative value because (1) the defense was "attempting to portray [Christina] in a negative light for posing for the pictures;" (2) "[t]he fact that she posed for nude and semi-nude photos, in poses that **[*14]** he dictated and with props that he provided to her and other models [did] not equal the victim consenting to having her vagina licked by the photographer taking the photos."

b. *Hearing on the People's in limine motion: The defense's six-minute DVD "video" and its "clip" excerpt of that video*

At the hearing on the People's foregoing in limine motion on December 4, 2007, defense counsel Brian White indicated that Wood took about 4,200 photographs "in very rapid succession" during the photo shoot, and those photographs were the "heart" of Wood's defense. Asserting that this was a "he said she said" case in which Wood's defense was that he orally copulated Christina with her consent, White argued that the photographs depicted Christina's demeanor.

Stating, "I don't really want to go through one by one 4200 photographs," White informed the court that he had "condensed them all into basically a quick time video," which was the "whole photo shoot [from]

beginning to end," that "very clearly" depicted Christina's demeanor and could be shown to the jury in less than six minutes. White argued that the photographs showed "absolutely no change in [Christina's] demeanor from beginning to end," and **[*15]** depicted her smiling with a "bright" face and continuing to pose provocatively, "even after the alleged assault." This unchanging behavior, he argued, was "inconsistent" with "somebody who had just been essentially raped. That's the heart of our case."

The court responded that "4200 provocative photos seems like it might be overkill." Replying that the photographs were relevant to the issues of Christina's credibility and whether she gave her consent, White stated:

> "If we're going to go [] one by one through 4200 photographs, I can see the court's going to say that's overkill. But to have them looked at--I've talked longer now than the video's going to be. It's less than six minutes and it shows the whole shoot."

White also argued that if the court excluded the video, Wood would be deprived of his due process right to defend himself and to have effective representation of counsel.

The prosecutor, Brian Erickson, argued that Wood had previously intimidated Christina by threatening to show the photographs to the whole world; Wood was "continu[ing] to intimidate her by showing her all of those"; and the six-minute video was "irrelevant to show consent." Erickson asserted that the video was **[*16]** "[not] going to really capture what happened there anyway" because it would not have captured Wood coming up to Christina and "put[ting] her in position with the wardrobe." The photographs were "highly prejudicial," there was no reason to show Christina naked, and "at the very least" the number of photographs shown to the jury "should be limited."

Indicating it had not yet seen the photographs, the court tentatively determined that some of the post-incident photographs might be relevant on the issue of Christina's credibility, "[a]ssuming proper foundation is laid." The court indicated it did not see the relevance of showing an "11 or 12 photo a second montage" and expressed concern that it might prejudice the jury. White responded that such a ruling would "gut[]" the "heart" of Wood's defense and would deprive him of his due process right to present a defense, because the photographs, "all 4200 of them," are Wood's defense.

Later, the court indicated it had viewed the "roughly six-minute montage of photos from the photo shoot." The court also indicated that its "overall feeling" had not changed very much; in fact, it felt "more strongly about this"; and it did not see "any [] more relevance **[*17]** to the photos indicating consent." The court stated that seeing Christina "pose in these fashions" would end up "being cumulative after some dozens of photos," and it would "inflame passion and prejudice in the jury to the point where it seems likely they would view [Christina] as . . . sort of trampy." The court expressed concern that some of the jurors "could very easily . . . decide the case on their distaste or disdain for someone who would be willing to do something so explicit and outside the norm in some people's view."

The court then made its tentative ruling under *Evidence Code section 352*, finding that the "risk of prejudice would probably substantially outweigh the probative value because I don't see that much probative value for most of" the six-minute montage "DVD."

After the jury was selected and sworn, and out of the presence of the jury, the court revisited the issue of the admissibility of the DVD, stating, "I haven't concluded anything, including whether or not we're ultimately going to need [an *Evidence Code section] 402* [hearing]." After hearing further arguments, and indicating it would "continue to think about it," the court stated, "I'm just not at that threshold **[*18]** where I'm seeing the relevance outweighing what I see as substantial prejudice because of the inflammatory or passion-inducing nature of the photos."

The next day, before the People called their first witness (Christina), the court agreed to revisit the in limine motion issue. After hearing argument, the court indicated that after either Christina's direct examination or some cross-examination, "depending what she denies or doesn't deny," it would "need to assess whether there's anything relevant in the photos as far as impeachment goes," and thus it would need to conduct an *Evidence Code section 402* hearing "to address the DVD or the photos to establish whether or not there is any issue over the sequence or timing of the photos, . . . or when the incident occurred, and see whether or not you can lay a foundation for some or all of the photos."

Wood's counsel, White, responded that, without "trying to work [his] way back to exclude the photographs," he had a "clip that is basically an excerpt from the video" that the court had watched the previous day. White explained that the clip was the series of photos "right after [Christina] says the incident occurred." White

stated the clip showed **[*19]** "her demeanor immediately after the incident," he did not think there was a risk of "inflaming the passions," and the clip was "highly relevant and important for the jury to see." It was the part of the six-minute video that immediately followed the series of photographs depicting Christina wearing the "red and white outfit." White explained that Christina had testified at the preliminary hearing that the oral copulation incident occurred during the costume change when she removed the red and white outfit and put on a purple bodice outfit.

White then reiterated that, "[a]t a minimum," it was important for the defense to "show that clip of her right after because . . . it's directly after the incident and it shows her demeanor."

The court asked the prosecutor, "[W]hat about that, Mr. Erickson, as far as the clip described if it was established that it was the one right after the alleged incident, the argument that it would be relevant to show a demeanor inconsistent with someone who has just been sexually assaulted?"

Indicating he had spoken with Christina, the prosecutor replied, "Yes, I think that's relevant." He also indicated he thought Christina would testify that she was still smiling **[*20]** and she stayed there for various reasons after the incident occurred.

The court indicated it was going to bring in the jury, give the "pre-instructions," hear the opening statements, and then begin Christina's direct examination. Addressing Wood's counsel, the court stated:

> "And then either during the break or at the end of the morning or something, we'll try to have a[n *Evidence Code section] 402* [hearing] prior to your cross-examination of [Christina] regarding the photos and the clip as an alternative you're proposing [to] see if you can establish sufficiently that it's *[sic]* the ones subsequent to the alleged incident."

White replied, "Okay."

c. *Commencement of trial and the Evidence Code section 402 hearing*

Following a portion of Christina's direct examination, the court conducted the *Evidence Code section 402* hearing "regarding the potential admissibility" of all or a portion of the photographs contained in the DVD. The court received the testimony of Christina and Wood's digital photography expert David Rivera, who testified as defense witnesses. The court also heard testimony by the People's witness, Detective Metz.

Following oral arguments, the court found that "the foundation for **[*21]** the DVD . . . has been laid," but stated, "I still have a problem with this whole DVD being admitted under the [*Evidence Code section] 352* grounds that I set forth earlier." The court asked both White and Erickson to "think of alternatives to the six-minute DVD being played because I still feel that under [*Evidence Code section] 352* it's unlikely I'd allow it in in total." The court asked the prosecutor to look at the sequence of photographs "from the red and white outfit to the immediately subsequent one, which is the one [Christina's] wearing in exhibit 'B'."

Defense counsel White indicated he had that sequence of photographs with him and could "queue it up" for the prosecutor to view. White stated, "This is the first outfit, [image No.] 1619, the purple bodice until the end of the purple bodice. So it's the series that comes right after the red and white outfit." Counsel then viewed the sequence of photographs.

d. *Continuation of the trial and presentation of photographs*

The next morning, December 6, 2007, the prosecution continued its direct examination of Christina. During a recess in her cross-examination, the court again revisited the People's motion in limine to exclude or limit **[*22]** the admission of the photographs. Over the prosecutor's objection, the court ruled it would allow defense counsel to "show what you've characterized as the appearance of masturbation during the session where the alleged incident occurred, the ones we just looked at on your laptop, where she is touching herself." The court reasoned that those photographs were relevant to Wood's mistake of fact defense that he reasonably believed Christina had given her consent.

The court also ruled under *Evidence Code section 352* that the entire six-minute DVD "video" would not be admitted into evidence "at this time," explaining that "[n]othing has occurred that would change my ruling on that." The court further ruled that Wood would be permitted to show the photographs of Christina that he took immediately before the alleged incident (photographs Nos. 791 through 1618 of the red and white outfit series) and after the alleged incident (the purple bodice series) for purposes of showing her demeanor, and showing that the nature of her poses

were inconsistent with someone who had just been sexually assaulted; however, the photographs would not be "sent into the jury room."

Following a recess, defense counsel **[*23]** stated that, based on the court's ruling that his proposed "video[of] the entire photo shoot" would not be admitted into evidence, he had prepared a series of redacted photographs in which "all of the private parts [had] been redacted out" to "alleviate" the court's previous concerns, and which were "representative of several different costume[s]" and showed Christina's "demeanor, particularly the face."

When the court asked whether this series of photographs was intended to show Christina's "pleasant" and "happy" demeanor, White replied, "Yes." The court then asked whether White planned on asking Christina whether these photographs were representative of her demeanor during the entire photo shoot, and White replied, "Yes." After further discussion, the court ruled, "I'm going to allow them."

During her cross-examination by Wood's counsel, Christina testified that the oral copulation incident occurred at the end of the session in which she was wearing a red-and-white outfit. Defense counsel showed her 16 photographs (exhibits 6 and H-V that were later admitted into evidence), which depicted her wearing different outfits and posing with various props. Christina acknowledged that exhibit **[*24]** 6 showed her smiling while wearing a purple bodice, black panties and stockings, which was the next outfit she wore after the incident occurred. When shown the remaining photographs, Christina acknowledged that she was smiling in exhibits H through K.

The court then permitted defense counsel White, with the courtroom lights turned off, to show the jury a series of photographs that White referred to as Nos. 791 through 1618, which were taken *before* the incident occurred and showed Christina wearing the red and white outfit. Christina agreed that some of the images depicted her touching her private parts, posing with a banana, and permitting Wood to position her legs.

Defense counsel then showed what he referred to as a "video," but which he explained was not a video but a set of photographs that "[had] been arranged quickly so it appears to go faster than it is," showing a series of photographs that Wood took *immediately after* the incident occurred. As he was showing the photographs, Christina admitted that the photographs "captur[ed] [her] demeanor immediately after th[e] incident occurred."

2. *Applicable legal principles*

Wood was convicted of misdemeanor sexual battery under section 243.4(e)(1), **[*25]** which provides: "Any person who touches an intimate part of another person, if the touching is against the will of the person touched, and is for the specific purpose of sexual arousal, sexual gratification, or sexual abuse, is guilty of misdemeanor sexual battery . . . ."

For criminal liability to attach to a defendant's conduct, section 20 requires the "union, or joint operation" of a criminal act and criminal intent. (See also CALCRIM No. 251 ["The crime charged in this case require[s] proof of the union, or joint operation, of act and wrongful intent."].) Here, the court properly instructed under CALCRIM No. 251 that for the jury to find Wood guilty of the crime of sexual battery, he must have "intentionally commit[ted] the prohibited act"--the alleged nonconsensual oral copulation--with the requisite "specific intent." That instruction informed the jury that "[t]he specific intent required for the crime of Sexual Battery is that the touching was done for the specific purpose of sexual arousal, sexual gratification, or sexual abuse." (See § 243.4(e)(1), discussed, *ante.)*

A defendant's reasonable and good faith belief that a victim voluntarily consented to the alleged criminal act **[*26]** can be a defense to a sexual offense charge. *(*People v. Mayberry (1975) 15 Cal.3d 143, 155.) This defense, often referred to as the *Mayberry* defense, "has two components, one subjective, and one objective." *(People v. Williams* (1992) 4 Cal.4th 354, 360 (Williams)*.)* To satisfy the subjective component, the defendant must demonstrate that he "honestly and in good faith, albeit mistakenly, believed that the victim consented." *(*Id. at pp. 360-361.) "In order to satisfy this component, a defendant must adduce evidence of the victim's *equivocal* conduct on the basis of which he erroneously believed there was consent." *(*Id. at p. 361, italics added.) To satisfy the objective component, the defendant must show that his "mistake regarding consent was reasonable under the circumstances." *(*Id. at p. 361.) *Williams* explained that, "regardless of how strongly a defendant may subjectively believe a person has consented to sexual intercourse, that belief must be formed under circumstances society will tolerate as reasonable in order for the defendant to have adduced substantial evidence giving rise to a *Mayberry* instruction." *(*Id. at p. 361.)

Here, Wood's defense to the sexual battery charged in count **[*27]** 1 was his *Mayberry* defense that he

reasonably and in good faith, but mistakenly, believed that Christina consented to his act of oral copulation. To prevail on this defense, Wood was required to prove that his allegedly mistaken belief that Christina consented to his act of oral copulation was (1) honestly held in good faith based on her own "equivocal" conduct, and (2) objectively reasonable. *(Williams, supra, 4 Cal.4th at pp. 360-361*.)

The United States Constitution guarantees a criminal defendant "'a meaningful opportunity to present a complete defense.'" *(Crane v. Kentucky (1986) 476 U.S. 683, 690*.) The right to present a defense generally requires that an accused have the opportunity "'to present all relevant evidence of significant probative value to his defense.'" *(People v. Babbitt (1988) 45 Cal.3d 660, 684*, quoting *People v. Reeder (1978) 82 Cal.App.3d 543, 553*, italics omitted.)

However, "[a] defendant's right to present relevant evidence is not unlimited" *(U.S. v. Scheffer (1998) 523 U.S. 303, 308)* and may be restricted in circumstances where necessary ""'to accommodate other legitimate interests in the criminal trial process,'"" *(ibid.)* such as adherence to standard rules **[*28]** of evidence. (See also *Taylor v. Illinois (1988) 484 U.S. 400, 410*.)

Evidence Code section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

A trial court has broad discretion in determining whether to admit or exclude evidence objected to on the basis of *Evidence Code section 352*, and rulings under this section will not be overturned absent an abuse of that discretion. *(People v. Ramos (1997) 15 Cal.4th 1133, 1170* [trial court's exercise of its broad discretion under *Evidence Code section 352* regarding admission of photographic evidence will not be disturbed on appeal unless the prejudicial effect clearly outweighs the probative value of the photographs].)

3. *Analysis*

Wood maintains that the "center of the bull[']s eye" of his "mistaken fact" defense were the more than 4,000 photographs he took of Christina, which he asserts "provided the foundation for his reasonable belief that she consented to his very minimal and very limited sexual **[*29]** touching." He complains that the jury saw only a "tiny slice" of the photographs. Wood also contends the court "cut the heart" out of his defense when it "sliced [the] evidence into one-fifth" by "allowing a small portion of the photos, and most of those only in the truncated form of a six minute video" that "wasn't even allowed to go to the jury during their deliberations." "If the jury had been allowed to see what [I] saw," Wood asserts, "they would have concluded that [I] had reason to believe that she consented to [my] conduct and would have had a reasonable doubt as to whether . . . [my] action was criminal."

Wood's conviction of misdemeanor sexual battery as charged in count 1 must be reversed because the trial court's ruling excluding the six-minute video (containing all of the more than 4,000 photographs Wood took during the photo shoot), thereby limiting the number of photographs presented to the jury, violated Wood's constitutional right to present his mistake-of-fact defense and was an abuse of the court's discretion under *Evidence Code section 352*.

As it is undisputed that Christina did not give express verbal consent, Wood was entitled to present all relevant evidence of **[*30]** significant probative value that would tend to prove that Christina engaged in "equivocal" nonverbal conduct upon which he allegedly believed, mistakenly but in good faith and reasonably, that she consented to the sexual touching. The more than 4,000 photographs Wood took of Christina, as contained in the six-minute video, were relevant and of significant probative value with respect to the factual issue of whether she engaged in such equivocal conduct before the sexual touching occurred. Those photographs were direct evidence of her demeanor and nonverbal conduct, both before and after the oral copulation. Thus, as a matter of due process, Wood was entitled to present those photographs, which were of critical importance to his defense, to the jury unless the exclusion of all or some of them was necessary to accommodate other legitimate interests in the criminal trial process, such as adherence to standard rules of evidence like *Evidence Code section 352*. (See *U.S. v. Scheffer, supra, 523 U.S. at p. 308*.)

Here, the court's exclusion of most of those photographs was not necessary to accommodate other legitimate interests in the criminal trial process and was an abuse of discretion under **[*31]** *Evidence Code section 352*. The record shows that at the hearing on the People's motion in limine to exclude the photographs or limit the number that could be presented to the jury, Wood's counsel indicated he did not want to present all of the photographs "one by one." Rather, he informed the

court that he had "condensed them all" into a six-minute "quick time video" of the entire photo shoot from "beginning to end," which clearly depicted Christina's demeanor and was the "heart of [the] defense." For purposes of *Evidence Code 352*, the presentation of that short "video" would not have necessitated undue consumption of time. Its presentation also would not have created a substantial danger of undue prejudice to the prosecution, as Christina's own testimony was very explicit about her nudity and her sexually provocative poses and use of props during the photo shoot, and the photographs the court allowed the jury to see were also sexually explicit.

In sum, the court abused its discretion and denied Wood a meaningful opportunity to present his *Mayberry* defense by excluding the six-minute video containing all of the photographs Wood took of Christina during the photo shoot. For the foregoing **[*32]** reasons, we reverse the judgment as to count 1 (*§ 243.4(e)(1)*).

B. *Ineffective Assistance of Counsel (Nanny Cam Videotape)*

Also in support of his appeal, Wood next contends his trial counsel provided ineffective assistance by failing to introduce into evidence a nanny cam videotape, which (Wood maintains) showed that Christina reasonably appeared to consent to the oral copulation. We reject this contention.

1. *Background*

At trial, an audio recording of Christina's telephone conversation with Wood on January 10, 2007, was played for the jury and the transcript was admitted into evidence. The conversation took place the day after Christina received Wood's e-mail warning her she would "be facing a very costly civil lawsuit from [him]" if she continued her criminal claims against him and telling her she should instruct Detective Metz to "back off" if she wanted to keep her graphic photographs private. During the conversation, Christina told Wood she was upset because he licked her without her permission, and Wood said her "masturbating in front of [him] [was] basically consent." When Wood said she did not tell him to stop and did not close her legs, Christina replied, "I did freeze" for "a **[*33]** matter of seconds." Wood chuckled and, revealing that he had secretly videotaped her during the photo shoot, told her "the *video record* would show you having fun for six minutes." (Italics added.)

When the prosecutor asked Christina whether she had any idea that Wood was videotaping her during the photo shoot, she replied, "No, I didn't know." Detective Metz testified that he was listening on the phone when Christina made the recorded telephone call to Wood, and he heard Wood say something about a videotape showing the incident lasted six minutes. Detective Metz indicated that Wood's attorney informed him there was a two-hour videotape, and he (Detective Metz) watched as the attorney played a minute of it on a computer, but he was never provided a copy of the video.

During his closing argument, the prosecutor argued that, "[i]f there was a video of six minutes of [Wood] orally copulating [Christina], where is it?" Later, the prosecutor argued that "the defense . . . didn't bring up the six-minute tape, and they don't bring these glaring realities that [Wood] is a liar."

In a new trial motion, Wood asserted that he had made a nanny cam video of the first two hours of the photo shoot and **[*34]** claimed his trial counsel, White, should have introduced the video into evidence. Asserting that White "entered the trial believing that he would be able to get all the photos of the shoot into evidence and therefore felt that [he] didn't need the nanny-video-cam," Wood claimed that although this "tactical decision" was likely competent before trial, by the end of the trial "it became improper for [White] to NOT present the video cam [evidence] to the jury" because (1) the court denied White's repeated requests to introduce all the photos into evidence, and (2) the prosecutor was able to present evidence and argument that Wood had "purportedly lied" about the video, and he had "'manipulated' Christina into succumbing into suggestive poses as if against her will." In his motion, Wood also asserted that White did not want to present the nanny cam video evidence because it would have shown Wood "providing Christina two shots of alcohol at the beginning of the shoot."

The People filed written opposition to the motion, arguing that Wood could not establish a claim for ineffective assistance of counsel because (1) White had acted in a reasonably competent manner, and (2) Wood could not establish **[*35]** prejudice.

At the July 2008 hearing on Wood's new trial motion, the prosecutor informed the court that "[t]here's no sound on the nanny cam." He argued that the defense was claiming the nanny cam video would refute Christina's testimony that she "froze" when Wood licked her, but the video would not support that claim because it did not show Wood committing the crime, and thus would not

show "her freezing." The prosecutor also argued that the video evidence would "strengthen my argument that [Wood] was, in fact, a liar." Wood's new counsel, Allen Bloom, stated that "the nanny cam does not directly show what happened during the vaginal licking, I admit that." Bloom agreed with the court's statement that the videotape "stops right before the incident," but maintained that the video "puts to rest once and for all . . . any claim by the prosecution that there was some manipulation . . . of the metadata" and argued the video established "when [Christina] froze."

With respect to the portion of the telephone recording in which Wood told Christina that "the video record would show you having fun for six minutes," the court stated "it's not true apparently" that the video would "exonerate [Wood] **[*36]** on that specific point."

The court then permitted Bloom to elicit testimony from White. White testified that before the trial began, he evaluated whether he should present the nanny cam video, but came to the conclusion that it should not be presented. White indicated that nothing he heard at trial caused him to change or reevaluate his trial tactic. On cross-examination by the prosecutor, White indicated that one of the reasons he did not want to introduce evidence of the nanny cam video was that it depicted Wood giving tequila shots to Christina, who was naked, and then "squirting some kind of lime juice or something down her throat after that." White indicated that he felt the video was prejudicial to Wood. Following additional arguments, the parties stipulated that the court could review the video off the record and outside the presence of counsel and Wood. The court continued the hearing to a date in August 2008.

At the followup hearing on Wood's new trial motion, the court indicated it had watched the nanny cam videotape. The court denied Wood's new trial motion, finding that White had handled Wood's defense in an objectively reasonable and competent manner and that Wood had failed **[*37]** to establish prejudice.

2. *Applicable legal principles*

To establish ineffective assistance of counsel, Wood bears the burden of showing both that counsel's performance was deficient, falling below an objective standard of reasonableness under prevailing professional norms, and that it is reasonably probable the verdict would have been more favorable to him absent counsel's error. (See *People v. Hernandez (2004) 33 Cal.4th 1040, 1052-1053*.) "We presume that counsel rendered adequate assistance and exercised reasonable professional judgment in making significant trial decisions." *(People v. Holt (1997) 15 Cal.4th 619, 703)* We will reverse on the ground of ineffective assistance of counsel "'only if the record on appeal affirmatively discloses that counsel had *no rational tactical purpose* for his act or omission.'" *(People v. Zapien (1993) 4 Cal.4th 929, 980*, italics added.). Furthermore, in an appropriate case, we may dispose of an ineffectiveness claim on the ground of lack of prejudice without determining whether his counsel's performance was deficient. *(Strickland v. Washington (1984) 466 U.S. 668, 697*; *In re Fields (1990) 51 Cal.3d 1063, 1079*.)

3. *Analysis*

Applying the foregoing principles, **[*38]** we conclude Wood has not, and cannot, establish his claim of ineffective assistance of counsel. First, assuming for purposes of this discussion that Wood's trial counsel (White) provided ineffective assistance by making what he called his "trial tactic" of not introducing the nanny cam video into evidence, we conclude Wood is unable to demonstrate a reasonable probability the verdict would have been more favorable to him absent White's ineffective assistance and is thus unable to show prejudice. As already discussed, Wood's new counsel, Bloom, admitted at the hearing on Wood's new trial motion that the nanny cam video "does not directly show what happened during the vaginal licking," and he agreed with the court's assumption that the video "stop[ped] right before the incident." Thus, even if White had introduced the nanny cam video into evidence, it would not have refuted the prosecutor's argument that Wood lied to Christina during the recorded telephone conversation when he told her that "the video record would show you having fun for six minutes." Evidence of the video recording also would not have impeached Christina's credibility when she testified she froze when Wood licked her **[*39]** because the video did not record the licking incident.

Second, Wood has failed to demonstrate that there could have been no rational tactical purpose for White's deliberate trial tactic of not presenting the nanny video, and thus he has failed to show that White's performance in failing to introduce the video into evidence was deficient, falling below an objective standard of reasonableness under prevailing professional norms. Had the defense presented the nanny cam video at trial, the jury would likely have found that Wood falsely told Christina during the recorded telephone conversation that "the video record would show [her] having fun for six minutes" when he orally copulated her. The jury

would also have learned that Wood gave shots of tequila to Christina when she was naked and had then squirted something down her throat during the photo shoot. The likelihood that the showing of the video would have been prejudicial to the defense is manifest. In sum, we reject Wood's contention that his trial counsel provided ineffective assistance by failing to introduce the nanny cam videotape into evidence.

C. *Ineffective Assistance of Counsel (Character Witnesses)*

In support of both his appeal **[*40]** and his petition, Wood also contends (as he did in his new trial motion) that his trial counsel provided ineffective assistance by failing to introduce into evidence the testimony of four female character witnesses whom he had also photographed in his home and who Wood asserts would have testified he was "always extremely professional," his conduct was "completely appropriate," and he never made improper advances. We reject this contention.

Given the state of the evidence at trial-- including Christina's testimony that during the "professional" photo shoot Wood asked her, "Does the photographer get some of that?," and his own recorded statement that her act of masturbation, which Christina said was only posing, constituted "consent" for his act of vaginally licking her--Wood has failed to demonstrate that his trial counsel had no rational tactical purpose for his decision to not call the women as character witnesses. *(People v. Zapien, supra, 4 Cal.4th at p. 980*.) A reasonably competent defense attorney may have had a valid tactical reason for not opening up the subject of Wood's character and his history of using the Internet to persuade young women to come to his home studio to participate **[*41]** in sexually provocative nude photography.

D. *Cumulative Error*

In support of his appeal, Wood also claims the court's failure to admit all of the photographs into evidence, his trial counsel's failure to introduce into evidence the nanny cam videotape, and his trial counsel's failure to present the testimony of the four female character witnesses "impacted directly on the issue of count 2" and acted to deny him a fair trial. We reject this claim of cumulative error.

1. *Applicable legal principles*

A series of trial errors, though harmless when considered independently, may in some circumstances rise by accretion to the level of prejudicial, reversible error. *(People v. Cunningham (2001) 25 Cal.4th 926, 1009*.) In determining whether reversal is required under the "cumulative errors" doctrine, "the litmus test is whether defendant received due process and a fair trial. Accordingly, we review each allegation and assess the cumulative effect of any errors to see if it is reasonably probable the jury would have reached a result more favorable to defendant in their absence." *(People v. Kronemyer (1987) 189 Cal.App. 3d 314, 349*.)

2. *Analysis*

Wood contends his conviction of dissuading Christina from **[*42]** reporting a crime in violation of section 136.1(b)(1), as charged in count 2, should be reversed because the court's failure to admit all of the photographs into evidence, combined with his trial counsel's failure to introduce into evidence the nanny cam videotape and present the testimony of the four female character witnesses, resulted in a denial of his right to a fair trial with respect to that count. He also contends his "benign" January 9, 2007 e-mail to Christina was "[t]he only evidence" supporting count 2; and the email shows "how measured it was" and demonstrates that "[h]e never threaten[ed] anything in the e-mail, except the filing of a civil suit." These contentions are unavailing.

A review of the e-mail, which Christina read to the jury, shows that it was far from "benign" or "measured." In it, Wood warned her she should instruct Detective Metz to "back off" if she wanted to keep "[her] graphic photographs" private. Wood expressly threatened in the e-mail to "make public" those sexually explicit photographs for "the world to see." From this evidence, any jury could reasonably find that Wood attempted to dissuade Christina from reporting a crime in violation of section **[*43]** 136.1(b)(1). Although we have concluded that the court's exclusion of the six-minute video requires the reversal of Wood's count 1 sexual battery conviction, we have rejected his claims of ineffective assistance of counsel. Wood has not met his burden of showing that the court's error in excluding that video resulted in a denial of his right to a fair trial with respect to the offense charged in count 2, nor has he shown it is reasonably probable the jury would have reached a result more favorable to defendant in the absence of that error.

E. *Section 136.1(b)(1)*

In support of both his appeal and his petition, Wood next contends that section 136.1(b)(1) is either constitutionally flawed, or flawed as instructed, because

the statute does not have a mens rea requirement. In his petition, Wood also contends that his trial counsel provided ineffective assistance of counsel by failing to request an appropriate jury instruction. We reject these contentions.

1. *Background: Count 2, section 136.1(b)(1), and the court's instructions*

In count 2 of the information, Wood was charged with "unlawfully attempt[ing] to prevent and dissuade a victim and witness of a crime[, Christina], from making a report **[*44]** of that victimization to a peace officer" in violation of section 136.1(b)(1), which provides:

> "(b) Except as provided in subdivision (c), every person who attempts to prevent or dissuade another person who has been the victim of a crime or who is witness to a crime from doing any of the following is guilty of a public offense and shall be punished by imprisonment in a county jail for not more than one year or in the state prison: [P] (1) Making any report of that victimization to any peace officer or state or local law enforcement officer or probation or parole or correctional officer or prosecuting agency or to any judge."

At trial, the court instructed the jury under CALCRIM No. 2622 in part as follows with regard to count 2:

> "The defendant is charged in Count 2 with intimidating a witness. [To prove that the defendant is guilty of this crime, the People must prove that: 1, The defendant tried to prevent or discourage [Christina] from cooperating or providing information so that a complaint could be sought and prosecuted, and from helping to prosecute that action; 2, [Christina] was a witness or a crime victim; and 3, The defendant *knew* he was trying to prevent or discourage [Christina] **[*45]** from causing prosecution and *intended* to do so." (Italics added.)

The court also instructed the jury under CALCRIM No. 251 on the specific intent required for a conviction of count 2:

> "The crimes charged in this case require proof of the union or joint operation of act and wrongful intent. . . . [P] The *specific intent* required for the crime of attempting to dissuade a witness from reporting a crime is that the defendant *knew* he was trying to prevent or discourage a witness from cooperating or providing information so that a complaint or information could be sought and prosecuted, and *intended* to do so." (Italics added.)

2. *Analysis*

In support of his claim that section 136.1(b)(1) is constitutionally flawed because it does not have a mens rea requirement, Wood contends that "[t]he statute does NOT require that the crime about to be reported must be legitimate or must be perceived to be legitimate or is known to the reporter as legitimate or is known to the 'dissuader' as being legitimate." He asserts "[t]he statute forbids the act of dissuading a witness from ALL reports of a crime, apparently even if the report is mistaken or knowingly false." These contentions are unavailing.

In *People* ***[*46]*** *v. Young* (2005) 34 Cal.4th 1149, 1210 (Young), which upheld the defendant's conviction of intimidating a witness (§ 136.1) for punching the victim in the face in a holding cell and telling him "[y]ou snitched on me," the California Supreme Court explained that "[t]he crime of intimidating a witness requires proof that the defendant specifically intended to dissuade a witness from testifying." In *Young,* the high court concluded that the trial court's instruction on the offense of witness intimidation was erroneous because it omitted the requisite language that the defendant specifically intended to prevent or dissuade the victim from testifying at trial, but also concluded (for reasons not pertinent here) that the instructional error was not prejudicial. *(Young, supra,* at p. 1211.)

Here, like the crime of intimidating a witness discussed in *Young,* the crime of attempting to prevent and dissuade a victim of a crime from making a report of that victimization to a peace officer in violation of section 136.1(b)(1) does have a mens rea requirement, i.e., the specific intent to dissuade the victim from reporting her victimization to "any peace officer or state or local law enforcement officer **[*47]** or probation or parole or correctional officer or prosecuting agency or to any judge." (§ 136.1(b)(1), discussed, *ante;* see Young, supra, 34 Cal.4th at p. 1210.)

In this case, a review of the instructions the court gave to the jury regarding count 2 shows that the court, using standard Judicial Council of California Criminal Jury Instructions (2006-2007) (CALCRIM) instructions, properly instructed that in order to convict Wood of unlawfully attempting to prevent and dissuade Christina as a victim and witness of a crime from making a report of her victimization to a peace officer or law enforcement agency (§ 136.1(b)(1)), the jury was required to find beyond a reasonable doubt that at the time of his alleged criminal act, Wood *knew* he was

trying to prevent or discourage Christina from causing prosecution, and he *intended* to do so. With respect to the mens rea element of the offense charged in count 2, the constitution requires nothing further. We thus reject Wood's claims of constitutional and instructional error and his related claim of ineffective assistance of counsel, as they pertain to his conviction of count 2.

F. *Sufficiency of the Evidence*

Last, Wood also contends in support of **[*48]** his appeal that the evidence was insufficient to prove he violated section 136.1(b)(1). We reject this contention.

1. *Applicable legal principles*

When assessing a challenge to the sufficiency of the evidence, we must view the evidence most favorably to the prosecution and determine whether any rational trier of fact could have found the elements proven beyond a reasonable doubt. (*Jackson v. Virginia (1979) 443 U.S. 307, 319*.) "[T]he court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence--that is, evidence which is reasonable, credible, and of solid value--such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson (1980) 26 Cal.3d 557, 578*.)

Insofar as we are required to interpret the applicable statutory provisions, we apply a de novo standard of review. (See *Connerly v. State Personnel Bd. (2006) 37 Cal.4th 1169, 1175*.)

2. *Analysis*

Wood contends that section 136.1(b)(1) should be interpreted narrowly as prohibiting "the act of attempting to stop the *initial* reporting of the crime itself." (Italics added; original italics omitted.) He claims "there **[*49]** is no evidence that [he] attempted to prevent Christina from reporting the occurrence of the crime," and all he did was "contact Christina once after the report had already been made, and advise her that she made a false report" and that "he was going to sue her in a civil court, because it was his belief that no crime had occurred." These contentions are unavailing.

As already noted, Christina testified that she received an e-mail from Wood in January 2007 warning her it was a crime to file a false police report, she would "be facing a very costly civil from [him]" if she *continued* her criminal claims against him, and she should instruct Detective Metz to "back off" if she wanted to keep her graphic photographs private. Christina also testified that she felt "threatened" after she received that e-mail.

Christina's testimony was sufficient to sustain Wood's conviction of count 2, as it supports a reasonable finding that Wood was attempting to pressure Christina into *withdrawing* her report to the police that she was the victim of a sex crime. Wood ignores the obvious point that a defendant's act of using a threat to persuade a victim or witness to withdraw a report she has made to the **[*50]** police is tantamount to using a threat to dissuade a victim or witness from filing such a report.

Wood relies on *People v. Fernandez (2003) 106 Cal.App.4th 943* for the proposition that the act of attempting to persuade a victim or witness to *withdraw* her complaint is "an entirely different act" that is not covered by section 136.1(b)(1). Wood's reliance on *Fernandez* is unavailing. That case involved a defendant's request that a witness testify untruthfully at the defendant's preliminary hearing. (*Fernandez, supra, 106 Cal.App.4th at pp. 945-946*.) The Court of Appeal reversed the defendant's conviction of dissuading a witness in violation of section 136.1(b)(1), holding that although there was ample evidence that the defendant intended to influence the witness's testimony at the preliminary hearing, "there was no evidence that he intended to prevent or dissuade [the witness] from making a 'report' as required by section 136.1[](b)(1)." (*Fernandez, supra, at p. 951*.)

DISPOSITION

The petition is denied. The judgment of conviction on count 1 and related sentencing orders, such as the order requiring Wood to register under *Penal Code section 290* as a sex offender, are reversed. In all other **[*51]** respects, the judgment is affirmed.

NARES, J.

WE CONCUR:

BENKE, Acting P. J.

HUFFMAN, J.

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